STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

EDWARD HATHCOCK,

Defendant-Appellant,

_____/

Supreme Court No. 124070

Court of Appeals No. 239438

Wayne Circuit Court No. 01-113583-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

AARON T. SPECK & DONALD E. SPECK,

Defendants-Appellants,

_____/

Supreme Court No. 124071

Court of Appeals No. 239563

Wayne Circuit Court No. 01-114120-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

AUBINS SERVICE, INC, DAVID R. YORK, Trustee, David York Revocable Living Trust,

Defendants-Appellants,

_____/

Supreme Court No. 124072

Court of Appeals No. 240184

Wayne Circuit Court No. 01-113584-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

JEFFREY J. KOMISAR,

Defendant-Appellant,

_____/

Supreme Court No. 124073

Court of Appeals No. 240187

Wayne Circuit Court No. 01-113587-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

ROBERT & LELA WARD,

Defendants-Appellants,

-and-

HENRY Y. COOLEY,

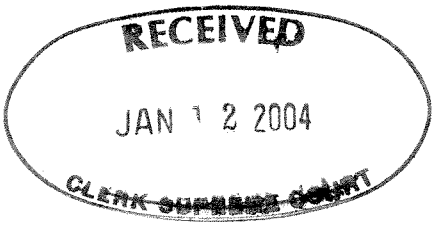
Defendant,

_____/

Supreme Court No. 124074

Court of Appeals No. 240189

Wayne Circuit Court No. 01-114113-CC



WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

MRS. JAMES GRIZZLE &
MICHELLE A. BALDWIN,

Defendants-Appellants,

-and-

RAMI FAKHOURY,

Defendant,

_____/

Supreme Court No. 124075

Court of Appeals No. 240190

Wayne Circuit Court No. 01-114115-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

STEPHANIE A. KOMISAR,

Defendant-Appellant,

_____/

Supreme Court No. 124076

Court of Appeals No. 240193

Wayne Circuit Court No. 01-114122-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

THOMAS L. GOFF, NORMA GOFF, MARK,
A. BARKER & KATHLEEN A. BARKER,

Defendants-Appellants,

_____/

Supreme Court No. 124077

Court of Appeals No. 240194

Wayne Circuit Court No. 01-114123-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

VINCENT FINAZZO,

Defendant-Appellant,

-and-

AUBREY & DULCINA GREGORY,

Defendants,

_____/

Supreme Court No. 124078

Court of Appeals No. 240195

Wayne Circuit Court No. 01-114124-CC

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Appellants timely sought and were granted leave to appeal the final judgment of the circuit court "upholding or determining public necessity" (Opinion and Order on The Issue of Necessity, 12/19/01; Apx 916a), following the circuit court's denial of appellants' timely-filed motion for rehearing (Order Denying Motion for Reconsideration, 1/24/02; Apx 955a). After an appeal to the Court of Appeals, that Court affirmed in an unpublished opinion. (Opinion, 4/24/03; Apx 977a). Rehearing was timely sought, but denied. (Order, 6/2/03; Apx 998a).[1]

The jurisdiction of this Court is predicated on Const 1963, art 6, § 4 and MCR 7.301(A)(2). This Court granted leave to appeal. (Order, 11/17/03; Apx 999a). This Court directed the parties to include among the issues to be briefed "(1) whether plaintiff has the authority, pursuant to MCL 213.23 or otherwise, to take defendants' properties; (2) whether the proposed takings, which are at least partly intended to result in later transfers to private entities, are for a 'public purpose,' pursuant to *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981); and (3) whether the 'public purpose' test set forth in *Poletown*, *supra*, is consistent with Const 1963, art 10, § 2 and, if not, whether this test should be overruled. Further, the parties should discuss whether a decision overruling *Poletown*, *supra*, should apply retroactively or prospectively only, taking into consideration the reasoning in *Pohutski v City of Allen Park*, 465 Mich 675 (2002)."

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[1]The Court of Appeals' jurisdiction is provided by law. Const 1963, art 6, § 10. The Court of Appeals thus had proper jurisdiction over this matter pursuant to MCL 213.56(5) and (6), which provide:

> (5) The court's determination of a motion to review necessity is a final judgment.
>
> (6) Notwithstanding section 309 of the revised judicature act of 1961, ... being section 600.309 of the Michigan Compiled Laws, an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.

STATEMENT OF THE QUESTIONS PRESENTED

I.

DOES WAYNE COUNTY HAVE THE AUTHORITY, PURSUANT TO MCL 213.23 OR OTHERWISE, TO TAKE DEFENDANTS' PROPERTIES?

Wayne County answers "Yes."

Defendants-Appellants answer "No."

The trial court answered "Yes."

The Court of Appeals did not answered "Yes."

II.

ARE THE PROPOSED TAKINGS, WHICH ARE AT LEAST PARTLY INTENDED TO RESULT IN LATER TRANSFERS TO PRIVATE ENTITIES, FOR A "PUBLIC PURPOSE," PURSUANT TO *POLETOWN NEIGHBORHOOD COUNCIL v DETROIT*, 410 MICH 616 (1981)?

Wayne County answers "Yes."

Defendants-Appellants answer "No."

The trial court answered "Yes."

The Court of Appeals answered "Yes."

III.

SHOULD *POLETOWN* BE OVERRULED BECAUSE THE "PUBLIC PURPOSE" TEST SET FORTH IN IT IS INCONSISTENT WITH CONST 1963, ART 10, § 2?

Wayne County answers "No."

Defendants-Appellants answer "Yes."

The trial court answered "No."

The Court of Appeals did not answer this question.

IV.

SHOULD ANY DECISION OVERRULING *POLETOWN* BE APPLIED RETROACTIVELY?

Wayne County presumably answers "No."

Defendants-Appellants answer "Yes."

The trial court did not answer this question.

The Court of Appeals did not answer this question.

STATEMENT OF FACTS

A. The Nature Of The Action.

This appeal arises out of Wayne County's effort to condemn defendants-appellants' property pursuant to MCL 213.23 for the Pinnacle Aeropark, a land development scheme pursued by the County near the Wayne County airport's newest midfield terminal. The Court of Appeals held that the County was entitled to take defendants-appellant's property, as a matter of statutory and constitutional law. From that decision, defendants-appellants successfully sought leave to appeal to this Court.

B. Character Of The Pleadings And Proceedings.

On approximately April 26, 2001, Wayne County filed condemnation complaints' seeking to condemn property[2] owned by the defendants-appellants for a project known as Pinnacle Aeropark, an office and industrial park type of development. (Condemnation, Wayne County Circuit Court Nos. 01-113583; 01-114120; 01-113584; 01-113587; 01-114113; 01-114115; 01-114122; 01-114123; 01-114124).

The property owners filed motions to review necessity with supporting memoranda. (Motions to Review Necessity, 5/23/01; Speck Motion to Review Necessity, 5/15/01). Among other issues, property owners asserted that Wayne County did not have the legal authority or power to condemn the property owners' property for the stated purposes, the project was too speculative to support the condemnation of the property, and that the proposed condemnation was not for a public use or purpose. An evidentiary hearing was conducted before the Honorable

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[2]Although Wayne County filed separate condemnation actions against each property, as required by statute, the matters were maintained in a consolidated format before the circuit court and the Court of Appeals. All motions, discovery and evidentiary hearings were deemed applicable to all parties involved in these proceedings. The evidentiary hearings spanned over six weeks, during which time approximately ten days of testimony were taken.

Michael F. Sapala of Wayne County Circuit Court beginning on September 24, 2001 and concluding with oral argument on November 16-17, 2001. (Tr, 9/24/01; 9/26/01; 9/27/01; 9/29/01; 10/10/01; 10/12/01; 10/22/01; 11/1/01; 11/14/01/ 11/16/01).

On December 19, 2001, the circuit court issued its opinion and order and final judgment on the issue of necessity. (Order, 12/19/01; Apx 916a; Opinion, 12/19/01; Apx 916a). In its opinion and order, the circuit court concluded that "MCL 213.23 provides sufficient statutory authority for the County to maintain these condemnation actions; that the Defendants have failed to show that the County abused its discretion in finding that the condemnation of these properties was necessary; and finally, that the condemnation of Defendants property primarily serves a public purpose." (Opinion, 12/19/01, 35; Apx 916a).

On January 24, 2002, the circuit court denied the proper owners' timely motion for reconsideration. (Order Denying Motion for Reconsideration, 1/24/02; Apx 955a). The Court of Appeals granted leave to appeal, but ultimately affirmed on the theory that the case is governed by *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981). (Opinion, 4/24/03; Apx 977a). A concurring opinion, authored by Judge Murray, urged the overruling of *Poletown* as wrongly decided.

C. Material Facts.

The County describes the Aeropark Project, sometimes called the Pinnacle Project, as "a mixed-use business park, with the focus being the development of light manufacturing and research and development facilities as well as hotel, recreational facilities and open use land." (Complaint, ¶4; Apx 181a). The real property that Wayne County seeks to condemn in connection with the project lies to the south of the airport's newest midfield terminal. The project encompasses approximately 1300 acres of land within boundaries drawn by Mike Kasarda and De Witt Henry by placing a magic marker on a map and drawing a line around land

areas that the County had purchased in a hodgepodge manner due to FAA noise reduction requirements. (Tr, 9/24/01, pp 20-28; Apx 490a-498a). Roughly two-thirds of the property to be included in the proposed development lies within Huron Township and the rest is within the City of Romulus. (Tr, 9/24/01, pp 25-26; Apx 495a-496a). The County plans to develop a project in that location because of its proximity to the airport and to 275, a location that County staff believed was "ideal" for "a mixed use development such as we're proposing." (Tr, 9/24/01, p 20; Apx 490a). Although the County claims that its goal is to get property back onto the tax rolls after it purchased it for noise reduction, create jobs, and increase taxes (Tr, 10/10/01, p 67; Apx 714a), De Witt Henry conceded that getting the property back onto the tax rolls could be done simply by selling the properties. (Tr, 10/10/01, p 43; Apx 691a).

The County is acting as a private developer to begin a development but its goal is to sell the property to private developers with the hope that the private developers will make a profit. (Tr, 9/24/01, p 51; Apx 521a; Tr, 10/10/01, pp 67; Apx 715a). Witnesses for the County testified that the final end users for the project were not known and would not be known until the project is finally developed, if ever. (Tr, 10/22/01, p 46; Apx 809a). Witnesses for the County testified that the year before the County instituted condemnation proceedings "Wayne County was the number one of all the counties in the United States in terms of economic growth, and the airport is a major engine for economic development, and that's one of the reasons why the Pinnacle project became critical in terms of associated land use for us." (Tr, 10/10/01, pp 100-101; Apx 748a-749a). The region experienced population growth, the pace of construction was hot, and unemployment rates were low. (Tr, 10/10/01, pp 102-104; Apx 750a-752a).

The Wayne County Board of Commissioners enacted a resolution to begin condemnation proceedings on July 12, 2000. (Tr, 10/10/01, p 70; Apx 718a). The property owners challenged

the necessity of the project. The County's Resolution of Necessity and Declaration of Taking sets forth the following ostensible purposes of the condemnation:

> (i) The creation of jobs for its citizens, (ii) the stimulation of private investment and redevelopment in the County to ensure a healthy and growing tax base so that the County can fund and deliver critical public services, (iii) stemming the tide of disinvestment and population loss; and (iv) supporting development opportunities that would otherwise remain unrealized....

(Resolution No. 2000-407; Apx 196a). The Resolution of Necessity also indicates that these condemnation actions have been instituted for the following additional purposes: development of recreational facilities and open use lands, construction, improvement and maintenance of public roads and highways, construction, improvement and maintenance of storm drainage ditches and other storm discharge facilities, and possible airport expansion, possibly including construction of a new runway. *Id.*

SUMMARY OF ARGUMENT

William Blackstone long ago recognized the importance of property rights to the individuals who own real property. He said:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

William Blackstone, Commentaries on the Laws of England 2 (1765) quoted in Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 22 (1985). The drafters of Michigan's Constitution included a provision to limit the right of the sovereign state to exercise its power of eminent domain in order to protect the individual right of dominion over property that has long been cherished by Michigan citizens. Const 1963, art 10, § 2. Protection for individual property rights is also embodied in the many statutes that delegate the necessary substantive and procedural power to local governments for their use of eminent domain. See e.g., MCL 213.23.

Wayne County's effort to take the property at issue here is inconsistent with all of these important limitations on a county's use of eminent domain. It is an effort unauthorized by MCL 213.23 or any other statute identified by the County. MCL 213.23 limits a public corporation's exercise of eminent domain to circumstances in which the private property taken is necessary, is for public improvement, purposes of incorporation, or public purposes, is within the scope of the public corporation's powers, and is for the use or benefit of the public. Wayne County's effort fails on each and every one of these essential requirements. And Wayne County lacks power otherwise for its condemnation effort here. The power of eminent domain is not one that the courts will find as an "implied" power of a county. *Lansing v Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993). The source of such power must be located within a legislative

delegation of power. *Detroit Sharpshooters' Ass'n v Highway Comm'rs of Hamtramck*, 34 Mich 36 (1876). No such delegation has been identified that would allow the County to condemn property here. Thus, a reversal is required on the basis of a lack of authority.

A reversal is also required on constitutional grounds. Following in the footsteps of John Locke and James Madison, the drafters of the Michigan Constitution limited the taking of private property to "public use" and required that "just compensation" be paid. See generally, John Locke, Two Treatises of Civil Government 430, 460 (P Laslett, rev ed, 1965); James Madison, Property, reprinted in Madison: Writings 515 (J Rakove ed, 1999); Const 1963, art 10, § 2.

The Michigan Constitution provides:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

Const 1963, art 10, § 2. This provision does not permit the taking of property for private use. The text of the provision itself bars such an interpretation. Public cannot be read to mean private. Nor can the word purpose be judicially substituted for use. Purpose and use are not synonyms. The framers used each of these words in the constitution in different contexts, which suggests that they did not intend for one word to mean the same as the other. Compare Const 1963 art 10, § 2 with Const 1963, art 7, § 21. When *Poletown* read "public use" to be the same as "public purpose", it erred. That error requires a reversal here.

ARGUMENT I

WAYNE COUNTY LACKS AUTHORITY, PURSUANT TO MCL 213.23 OR OTHERWISE, TO TAKE DEFENDANTS' PROPERTIES.

A. Standard Of Review.

The issue presented requires this Court to ascertain the meaning and proper interpretation of MCL 213.23 and of Const 1963, art 10, § 2. Issues of statutory and constitutional interpretation are questions of law and this Court reviews them de novo. *State Farm Fire & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 145-146; 644 NW2d 715 (2002).

A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). When a legislature has unambiguously conveyed its intent in a statute, the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); *Lake Angelus v Oakland Co Rd Comm'n*, 194 Mich App 220, 224; 486 NW2d 64 (1992). In construing a statute, this Court gives the words used by the Legislature their common, ordinary meaning. MCL 8.3a; MSA 2.212(1).

The Court considers the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). In other words, a word or phrase is given meaning by its context or setting. *Tyler v Livonia Public Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999). Because this Court's judicial role precludes imposing different policy choices than those selected by the Legislature, it is obligated to discern the legislative intent that may reasonably be inferred from the words expressed in a statute by examining the statutory language. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979).

These traditional principles of statutory construction force courts to respect the constitutional role of the Legislature as the policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction necessarily invites judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. See *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy"). This Court has cautioned against "Herculean effort[s]" to avoid the clear language of a statute or rule by creating "an ambiguity where none exists in order to achieve the desired result...." *People v McIntire*, 461 Mich 147, 153-54; 599 NW2d 102 (1999). When two or more statutory provisions have a common purpose, the terms of the provisions should be read to be read together so as to give the fullest effect to each provision. *Glover v Parole Bd*, 460 Mich 511; 596 NW2d 598 (1999). The Court is to avoid any interpretation that would render part or all of a statute nugatory and meaningless. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999).

B. Wayne County Lacks Authority Under MCL 213.23 To Condemn The Defendants' Property.

In attempting to take the defendants' property, Wayne County proceeded under MCL 213.23. In its answer to request for discovery no. 7, the County identified MCL 213.21 et seq. as the sole statutory authority for its effort to condemn the property expressly disclaiming reliance on any other statutory authority. A review of this statute reveals that the County was not authorized to take the property at issue here.

MCL 213.23 provides:

> Any public corporation or state agency is authorized to take private property necessary for public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the

> public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

The criteria that must be satisfied before a public corporation is authorized to exercise the power of eminent domain is embodied in a lengthy and complex sentence in MCL 213.23. Careful study of its text reveals:

1) The private property taken must be necessary;

2) The taking must be
   a) for public improvement; or
   b) for the purposes of the public corporation's incorporation; or
   c) for public purposes;

3) The taking must be within the scope of its [the public corporation or state agency's] powers;

4) and it must be for the use or benefit of the public.

MCL 213.23. Wayne County has not, and cannot, satisfy these statutory requirements. And they do not empower the County to take property.

The first phrase, "[a]ny public corporation or state agency is authorized to take private property," cannot be read alone. It must be read together with the remainder of the sentence, which imposes a series of restrictions on that power. And it must be read together with the second and third sentences in the provision, which shed light on the first sentence's meaning. Like many statutes with complex and lengthy sentence structures, this one requires careful analysis—in terms of its text, grammatical structure, and context.

Review of the first sentence reveals the first restriction, which stems from the word "necessary," which modifies "private property." This modifier makes clear that only property

that is necessary may be taken. Other restrictions are embodied in the prepositional phrases at the end of the sentence. These prepositional phrases are part of the larger noun phrase connected with property, which functions as the direct object of the government action. See generally, Helen Hoyt Schmidt, *Advanced English Grammar*, pp 333-343 (1995). The prepositional phrases qualify property by explaining when it may be taken. A series of phrases then describe and limit the kind of property that can be taken according to its purpose. Each phrase is divided by "or," thus revealing that they function as alternatives. The final two phrases in the sentence, "within the scope of its powers" and "for the use or benefit of the public" modify all of the preceding alternatives. In other words, the legislature made clear in this sentence that taking would be permitted if necessary and if for one of the three categories of purposes, if (1) the taking was within the scope of its [the public corporation or state agency's] powers; and if (2) it was for the use or benefit of the public.

MCL 213.23 does not itself confer on counties the power of eminent domain for general public purposes. It merely declares that a county may condemn land for public purposes if the taking of privately held land is "within the scope of its powers." The text does not define the scope of the condemning authority's powers; it directs the reader elsewhere to determine this. This reading of the phrase is confirmed by analysis of the second and third sentences of MCL 213.23. The second sentence authorizes a "state agency or division thereof or the office of governor or a division thereof" to acquire lands by "purchase, condemnation or otherwise." The third sentence then discusses "the unit," a phrase which refers back to "such unit," which in turn refers back to "a state agency or a division thereof or the office of the governor or a division thereof." The third sentence does not refer to or encompass any "public corporation." The specific authorizing language in the last sentence provides that "[f]or purposes of condemnation the unit may proceed under the provisions of this act." MCL 213.23. Only "the unit," may

proceed under the provisions of MCL 213.23 for purposes of condemnation. Thus, when the state agency looks to the scope of its powers to condemn, it can point to the second and third sentences, which specifically empower such units to condemn property "under the provisions of this act." *Id.* But Wayne County and other public corporations are not encompassed within or empowered to condemn property by the second and third sentences. Other entities, such as Wayne County, are therefore allowed to "institute and prosecute proceedings" only if the power to condemn can be located in some other statute.

This reading makes sense in light of the statute's history as well. MCL 213.23 was enacted in 1911, shortly after the Constitution of 1850 was replaced by the Constitution of 1908. The 1850 Constitution had provided a special exemption for the commissioners of highways.[3] This protection was eliminated in 1908 thus prompting the legislature to enact special legislative authority allowing state agencies and divisions to condemn property once an appropriation for the purpose of acquiring lands for a public purpose was made. The second and third sentences accomplish this. But this same level of legislative authority was not granted to all public

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[3]The 1850 Constitution provided:

> When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefore, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: Provided, The foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners.

The 1908 Constitution provided:

> Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefore being first determined and just compensation therefore first being made or secured in such manner as shall be prescribed by law.

corporations by the express terms of MCL 213.23. Instead, other entitles were authorized to take property "within the scope of [their] ... powers," that is, as allowed by other statutes.

1. The Taking Is Not Necessary As Is Required By MCL 213.23.

Michigan courts have traditionally interpreted "necessary" in the context of condemnation to mean needed now or in the near future. *Grand Rapids Bd of Education v Baczewski*, 340 Mich 265, 272; 65 NW2d 810 (1954), To show that the taking of property is necessary, the petitioner must show that the property will either be immediately used for the purpose for which it is sought to be condemned or will be used within a period of time that the jury determines to be the "near future' or a "reasonably immediate use." 340 Mich at 272. See also *City of Troy v Barnard*, 183 Mich App 565, 572; 455 NW2d 378 (1990) ("the words 'necessity' and 'public necessity' in the UPCA mean a necessity now existing or which will exist in the near future.")

Wayne County is using its eminent domain power to stockpile land against potential future needs. The County itself does not know who will ultimately purchase the property and build on the property, if anyone. (Prochaska Tr, 10/22/01, p 51; Apx 814a). The lack of firm plans and committed end users for the project is troubling in multiple ways. First, it means that the project is unnecessary and constitutes impermissible stockpiling, something clearly barred by the statutory text. Second, it precludes Wayne County from establishing that the taking is for a public purpose; allowing a taking with no definite use in mind would circumvent both the legislative and constitutional limitations on the use of eminent domain. Analysis of a proposed taking without a definite government plan for the property is highly subject to gamesmanship. A municipality seeking to avoid problems with a court disallowing the use of eminent domain for a

private use or purpose could simply announce that it lacks definite plans for the property, thus circumventing legislative and constitutional limitations on the taking of private property[4].

Additionally, in contrast to the typical development process, the County has not satisfied numerous conditions and requirements that are required to move forward with the project, all of which underscores the property owners' position that the taking is not necessary. Although Wayne County proposes to incorporate properties it purchased with Federal Aviation Administration funds into the project area, (Henry Tr, 9/24/01, pp 27-31; Apx 497a-501a), the County must obtain a "categorical exclusion" from the Federal Aviation Administration to release approximately four hundred acres of land in order to do so. (Prochaska Tr, 10/22/01, pp 22-23; Apx 785a-786a). Wayne County has not obtained wetland permits from the Michigan Department of Environmental Quality for mitigating wetlands located within the project boundaries, a complicated process because of certain extraordinary wildlife issues due to the proximity of the project to the Airport and its other existing environmental concerns. (Prochaska Tr, 10/22/01, pp 68-69; Apx 716a-717a; Henry Tr, 9/24/01, pp 47-48; Apx 517a-518a). Wayne County needs to obtain approximately ten million dollars from the Michigan Economic Development Corporation in relation to a "Smart Park" designation in order to pay for the infrastructure for the project. (Henry Tr, 9/24/01, 45; Apx 515a). Although the project itself has been designated as a Smart Park by the MEDC, Wayne County cannot receive any funding until and unless an inter-local agreement can be reached between the State of Michigan, Wayne County, the City of Romulus and Huron Township. (Prochaska Tr, 10/22/01, pp 58, 63; Apx

[4]Equally problematic, the County does not, and cannot, know how many or even if any jobs will be created as a result of this project, or whether the tax base for these properties will be increased at all. Entrepreneurs who move to the park may be coming from elsewhere in the county, to take advantage of tax abatements or other incentives shifting jobs and tax base from one metropolitan area location to another, while reducing net tax revenues during the period of any abatement. Nor can the County demonstrate that the use is public, since the ultimate users, although unknown, are intended to be, private enterprises.

706a-711a). County witnesses have testified that without the State funding, the project cannot be completed unless the County can discover some other source of funding. (Prochaska Tr, 10/22/01, p 57; Apx 820a). The necessary MEDC funding can at best be described as "conditional" funding. (Prochaska Tr, 10/22/01, p 63; Apx 826a).

Additionally, a local district finance authority as well as a tax increment finance plan and district must be created, each of which will require public support, the passing of resolutions by all parties involved, and negotiations regarding the tax capture rates for all of the various entities involved. (Prochaska Tr, 10/22/01, pp 58-61; Apx 821a-824a). None of these requirements have been met and there is no certainty that they ever will be. (Prochaska Tr, 10/22/01, pp 56-59; Apx 819a-822a). Proper zoning districts must be established by the local communities (City of Romulus and Huron Township) to accommodate the project, and the property must be re-zoned for its purposes. (Henry Tr, 9/24/01, pp 48-49; Apx 518a-519a; Prochaska Tr, 10/22/01, pp 17-18, 61; Apx 780a-781a, 824a). Without the support of the local communities, the project cannot move forward as a practical matter, again, in contravention of the doctrine barring excess taking. Thus, the proposed condemnation is a concealed form of land stockpiling that is prohibited under the statute, which bars takings unless they are necessary. *Grand Rapids Bd of Education v Baczewski, supra*; *City of Troy v Barnard, supra*.

The Court of Appeals accepted the County's assertion that it has planned to create a technology park as sufficient to show necessity. But merely designating an area as a technology park does not show that the property here is necessary for the park, or that the park is necessary for the public. Here, the record fails to support the determination that the taking is "necessary."

2. The Taking Does Not Fall Within One Of The Textual Categories Authorized Under MCL 213.23.

a. The Taking Is Not For A Public Improvement.

The circuit court correctly determined that the first prong of MCL 213.23 has no application because the County is not taking the property for a public improvement. Although MCL 213.23 does not define a "public improvement," that term has traditionally been understood to mean "improvements upon the property of the municipality which serve to further the operation of the municipal government and the interests and welfare of the public." Eugene McQuillin, 13 The Law of Municipal Corporations, p 8 (3d ed 1997). McQuillin's makes clear that the "term is limited to improvements which are the proper subject of police and local government regulation, and does not include private affairs or commercial enterprises." *Id.* citing *Cleveland v Detroit*, 324 Mich 527; 37 NW2d 625 (1948). As employed by Michigan courts, that term has encompassed projects such as a public sewer, *Delta Twp v Eyde*, 389 Mich 549, 550-551; 208 NW2d 168 (1973), a public school, *Union School Dist of Jackson v Star Commonwealth for Boys*, 322 Mich 165, 167; 33 NW2d 807 (1948), public parking meters, *Petition of City of Detroit*, 339 Mich 62; 62 NW2d 626 (1954), a village parking system, *Parr v Ladd*, 323 Mich 592; 36 NW2d 157 (1949), or other similar projects as defined in other laws. See MCL 46.171(2)(d); MCL 141.103(3)(b).

The County is not taking the property to build a "public improvement" but rather in aid of a contemplated private development. Not surprisingly, the County has not relied on this clause. And it provides no basis for empowering the County to take property here.

b. The Taking Is Not For Purposes Of Wayne County's Incorporation.

The second prong of MCL 213.23 is also inapposite because the County is not proposing to take land for the "purposes of its incorporation." The County has not argued to the contrary. Thus, this prong provides no basis for empowering the County to take property here.

c. The Taking Is Not For Public Purposes.

The only prong that could conceivably apply is the third prong of the statute, which addresses takings for public purposes. Wayne County has not, and cannot, show that the claimed public purpose predominates over the private benefits here. Thus, it was not entitled to take property under the statute. This argument is dealt with in more depth under Argument II, because, even under *Poletown*'s broad test for public purpose, this case is distinguishable and the lower courts erred in concluding that the County demonstrated a public purpose.

3. The Taking Is Not Within The Scope Of Wayne County's Powers.

Wayne County has not identified any other statute that applies here. Nor have the lower courts. Instead, they have read the first sentence of MCL 213.23 to empower the county to take private property for any public purpose. Neither the county nor the lower courts have explained what meaning can be derived from the modifier "within the scope of its powers." Nor have they discussed the second and third sentences, which would be unnecessary if the first sentence is read as a grant of authority to condemn rather than a limit on the proper scope of condemnation. To achieve the result and interpretation for which the County contends and which the circuit court and Court of Appeals adopted, the words "within the scope of its powers" must be excised from the statute. It would then read in pertinent part:

> Any public corporation or state agency is authorized to take private property ... for public purposes ... for the use or benefit of the public and to institute and prosecute proceedings for that purpose.

So worded, the statute might of itself grant condemnation authority to the County or any other state agency or public corporation if the other requirements were satisfied. But this reading of the statute violates a cardinal rule of statutory construction—that every word or phrase must be accorded meaning, and any construction that results in part of the statute being rendered nugatory or surplusage must be avoided. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001); *Allman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992); see also *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971); *In re MCI Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999).

The Legislature explicitly included the limiting phrase "within the scope of its powers" in MCL 213.23. The Legislature then included an additional two sentences that specifically authorize state agencies and divisions of them and the governor's office to proceed to condemn land under the statute. By negative implication, this suggests two conclusions. First, the language in the first sentence is insufficient to alone empower any entity to condemn property. Second, the power to condemn is granted only to state agencies because the second two sentences refer only to them and do not reference public corporations—in contrast to the first sentence, which does.

Moreover, the Legislature's subsequent actions belie the notion that MCL 213.23 was legislatively intended or understood as conferring on counties or other municipalities a general power of eminent domain to take private property for public purposes. MCL 213.23 was originally part of 1911 PA 149. At that time, MCL 213.71 (part of a panoply of statutes codified at MCL 213.71 to MCL 213.94), authorized cities, villages, boards of county road commissioners, and county boards of supervisors to take private property for public use. (MCL 213.71 was enacted as § 1 of 1877 PA 201). Thus, there was no need for a second statute to grant the condemnation powers to counties.

Furthermore, subsequent to the enactment of MCL 213.23, the Legislature passed a series of laws granting specific condemnation powers.[5] These later enactments would be superfluous if counties and other state and local government bodies were already generally empowered by MCL 213.23 to condemn land for any public purpose. Yet the Legislature is presumed to know

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[5]1919 PA 119, authorizing cities to condemn public utilities (now MCL 213.111 et seq);

1925 PA 215, authorizing the State Highway Commissioner to acquire public utility rights of way for state trunk line highway purposes (now MCL 213.151 et seq);

1929 PA 190, authorizing municipalities to acquire property for boulevards, streets, or alleys (now MCL 213.221 et seq.);

1933 PA (Ex Sess) 18, authorizing counties, villages, townships and cities to condemn land for housing facilities (now MCL 125.651 et seq.);

1941 PA 250, authorizing the establishment of urban redevelopment corporations and empowering them to condemn private property (now MCL 125.901 et seq.);

1945 PA 140, authorizing any public corporation or state agency to acquire overhead and underground rights (now MCL 213.251);

1945 PA 144, authorizing the condemnation and redevelopment of blighted areas (now MCL 125.71 et seq.);

1966 PA 295, authorizing municipalities, counties, drainage districts, county road commissions, and the state highway commission to acquire property, including residential property, for public highway purposes (now MCL 213.361 et seq.)

1974 PA 338, the Economic Development Corporations Act, which authorizes "municipalities" (statutorily defined in MCL 125.1603(d) as extending to counties, cities, villages or townships) to take private property for transfer to an EDC;

1975 PA 197, granting downtown development authorities the power of eminent domain (now MCL 125.1651 et seq);

1992 PA 173, granting condemnation powers to land reclamation and improvement authorities (now MCL 125.2451 et seq.);and

1996 PA 381, granting condemnation power to brownfield redevelopment authorities (now MCL 125.2651 et seq).

of and to legislate in harmony with existing laws. *Nummer v Treasury Dep't*, 448 Mich 534, 553 n 23; 533 NW2d 250 (1995); *Lenawee Co Gas & Electric Co v City of Adrian*, 209 Mich 52, 64; 176 NW 590 (1920); *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 43; 576 NW2d 641 (1998). *Robinson v Shatterproof Glass Corp*, 238 Mich App 374, 380; 605 NW2d 677 (1999). Additionally, the Legislature is presumed not to have intended to do useless things, still less to do them consistently over half a century and more. *Gross v General Motors Corp*, 448 Mich 147, 164; 528 NW2d 707 (1995); *Recorder's Court of Detroit v Detroit*, 134 Mich App 239, 243; 351 NW2d 289 (1984); *Haas v City of Ionia*, 214 Mich App 361; 543 NW2d 21 (1995).

1966 PA 295 is particularly telling in this respect, because it was enacted at the very same legislative session as 1966 PA 351, which amended MCL 213.21 et seq. Surely the strength of the presumption that the Legislature knows of and legislates in harmony with existing law increases when the prior legislation at issue came up before the very same session of the Legislature, the same committees held hearings, debated the language of the bill, and sent it to the floor of each house for further debate and voting, where the same senators and representatives that passed the first bill also approved the second. Indeed, both contemporaneous, prior, and subsequent legislation on the same subject is important in appreciating that MCL 213.23 did not delegate general authority to take property for any public purpose. As was held in *In re Macomber*, 436 Mich 386, 395 n 5; 461 NW2d 671 (1990):

> 2A Sands, Sutherland Statutory Construction (4th ed), § 51.03, p 469, provides:
>
> "In construing an ambiguous enactment it is held proper to consider not only acts passed at the same session of the legislature or other acts to which the act in question refers, but also acts passed at prior and subsequent sessions ...."

The Legislature amended MCL 213.23 at the same session during which it adopted a different and specific statute granting authority to the same governmental bodies to condemn land for public highway purposes. *Barnhart v Grand Rapids*, 237 Mich 90, 95; 211 NW 97 (1926);

Grand Rapids v Barth, 248 Mich 13, 17; 226 NW 690 (1929). If Public Act 149, MCL 213.23, were sufficient to alone empower counties to condemn private property for any public purpose, then the Legislature would not have had any need to adopt a separate act to do the same thing. But they were not. Thus, its adoption of these other acts empowered counties to exercise eminent domain for these purposes. The property owners' reading of the statute harmonizes this complex body of law and gives content to all of the words in MCL 213.23. See *Glover v Parole Bd*, 460 Mich 511; 596 NW2d 598 (1999); *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416; 662 NW2d 710 (2003).

4. The Taking Is Not For The Use Or Benefit Of The Public As Required Under MCL 213.23.

The taking must also be for "the use or benefit of the public." The Pinnacle Aeropark development will not be used by the public, but rather by private entrepreneurs, who will charge individual customers for whatever services or goods they provide with the intention of generating profit for themselves. Whether the aeropark is for the use or benefit of the public returns the inquiry to the question of whether public benefits will predominate over private ones.[6] The public benefit cannot be speculative or marginal but must be clear and significant. *Lansing v Edward Rose Realty*, 442 Mich 626, 634-635, 638-639; 502 NW2d 638 (1993). In *Rose*, the Supreme Court recognized that there must be some legal authority that identifies the claimed purpose or use as one benefiting the public. The putative public purpose of building a mixed-use business park to be developed by and transferred to private business entrepreneurs for

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[6]The statute's text, like the test embraced by the *Poletown* majority, does not limit the condemning authority to taking property for public use. In using the conjunction "or," the legislature made clear that either a public use or benefit would be sufficient. This statutory test is thus broader than the constitutional limitations that stem from a proper interpretation of the terms "public use" in the constitution.

private profit fails to satisfy the textual requirement that the project be "for the use or benefit of the public." MCL 213.23.

Whether a project is for "the use or benefit of the public" is ultimately a judicial question. *General Development Corp v Detroit*, 322 Mich 495, 498; 33 NW2d 919 (1948); *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 39-40; 64 NW2d 903 (1954); *Cleveland v Detroit*, 322 Mich 172, 179; 33 NW2d 747 (1948); *Portage Twp Board of Health v Van Hoesen*, 87 Mich 533, 539; 49 NW 894 (1891); *City of Center Line v Chmelko*, 164 Mich App 251, 260; 416 NW2d 401 (1987). The county's declaration is merely one factor to be weighed in that judicial assessment, not the end of the analysis, and where substantial proof of a primary public benefit is absent from the record, the "public benefit" factor must be regarded as unfulfilled. *City of Center Line v Chmelko, supra*, 164 Mich App at 262-263. The record here shows that factor is unfulfilled.

The County has not identified a definite "public use or benefit" within the meaning of the statute on which it relies. The Complaint refers to the County's tentative plan to develop "a mixed-use business park, with the focus being the development of light manufacturing and research and development facilities as well as hotel, recreational facilities and open use land." (Complaint, ¶4; Apx 181a). The County's goal is to transfer some or all of the property to private entities for the construction and operation of private businesses, including manufacturing plants, research and development facilities, hotels, or golf courses. This does not satisfy the statutory requirement that the condemnation be for the use and benefit of the public. Instead, it suggests a classic example of an impermissible taking for private benefit. Accordingly, the prerequisite statutory authority for these challenged takings is absent, and defendants-appellants should be awarded judgments of dismissal. *In re Petition of Rogers, supra*, 243 Mich at 521-522.

C. Wayne County Lacks Authority "Otherwise" To Take Defendants' Property.

Justice Cooley long ago explained that the state has the power of eminent domain as part of its rightful authority as a sovereign. *People ex rel Trombley v Humphrey*, 23 Mich 471 (1871). But the county is not a sovereign; it derives its power to condemn from the state. Home rule in the sense of inherent local government sovereignty analogous to state plenary power has never been a part of local government legal doctrine. See 1 Libonati & Martinez, Local Government Laws § 4.01, p 4-2. Municipal action that constitutes the taking of private property may only be sustained if it was taken under eminent domain power delegated from the state, with such limitations as are attached to the exercise of that power. Osborne M. Reynolds, Jr., Local Government Law, p 485 (2d ed, 2001). In other words, the power of eminent domain exists in municipalities only to the extent that it has been delegated to them by the state, through a constitution, statute, or duly enacted and authorized home rule charter. *Id.*

Michigan courts have long accepted these well-settled principles of local government law. Thus, this Court has held that a municipality lacks the power of eminent domain unless it has been specifically conferred by statute or the constitution. *Lansing v Edward Rose Realty, supra,* 442 Mich at 631-634. If a municipality seeks to locate the source of its power in a general delegation of authority, the power must be "essential or indispensable to the accomplishment of the objects and purposes of the municipality." *Id.* at 634. "Implied powers of counties are limited to those incident and necessary in the performance of their express powers and duties." *Wright v Varrz*, 339 Mich 55, 59-60; 62 NW2d 458, 460 (1954). In *Edward Rose Realty*, this Court read MCL 213.23 to require analysis of other provisions to find power for the City of Lansing to condemn property. This Court there looked to the home rule cities act, MCL 117.4e and to the City of Lansing's charter. 442 Mich at 632-633. But this Court found the cited provisions inadequate because they failed to specifically authorize takings for a city-franchised

cable television provider. Here, no statute either requires or permits Wayne County's charter to bestow on the county a general power of eminent domain; to the contrary, eminent domain is no more than implied for roads, bridges, and public utilities by MCL 45.514(d)(ii) and (p), and no broader powers, express or implied can be found in MCL 45.515. Thus, the County lacks power to take the property that is the subject of this dispute.

The public purposes declared in the County's Resolution of Necessity must fall within some statutory power which is both reposed in the County, and then duly invoked, *In re Petition of Rogers, supra*, 243 Mich at 521-522. Wayne County has not advanced any such power or duty, nor did either the circuit court or the Court of Appeals.

The Court of Appeals cited MCL 117.4e(1) and (2) to suggest that a home rule city may provide for the power of condemnation to supply various services "for any public use or purpose within the scope of its powers, whether herein specifically mentioned or not." (Opinion, p 9; Apx 985a). But that statute applies only to home rule cities that have provided for eminent domain in their charters. Wayne County is not a home rule city and has not pointed to any comparable statute and charter provision that would give it the power to act here. Moreover, the project does not involve a county plan to supply services of any kind to the public. The County insists that its powers stem from the County Charter, citing Section 1.112 of the Charter. Section 1.112, provides:

> Wayne County, a body corporate, possesses home rule power enabling it to provide for any matter of County concern and all powers conferred by Constitution or law upon charter counties or upon general law counties, their officers, or agencies.

Although the County has home rule under article 7, § 2 of the Michigan Constitution of 1963, the home rule power of a county does not encompass eminent domain unless some statute or charter provision specifically grants such power. See *Edward Rose Realty, supra*. Under Michigan law

as announced in *Edward Rose Realty*, the power to condemn property cannot be located in such general power.

The only other statute to which the County has pointed is the Charter Counties Act, MCL 45.501 et seq. The Charter Counties Act contains two types of Charter provisions, required and permissive. Required provisions are enumerated at MCL 45.514. The required provisions do not specifically discuss the power of eminent domain. MCL 45.515 provides for permissive Charter provisions. Among the permissive charter provisions is sub-section 15(c) which provides for

> The authority to perform at the County level any function or service not prohibited by law, which shall include, by way of enumeration and not limitation: police protection, fire protection, planning, zoning, education, health, welfare, recreation, water, sewer, waste disposal, transportation, abatement of air and water pollution, civil defenses, and any other function or service necessary or beneficial to the public health, safety, and general welfare of the County.

The specific items enumerated are traditional and well recognized public services. None of them discuss eminent domain.

This Court announced an analytical framework in *Barnhart* that still applies today. This Court there explained that the action to condemn property must be within the condemning authority's power as conferred, and "when the mode is prescribed, either by charter or ordinance, that mode constitutes the measure of the power." 237 Mich at 96. In other words, to exercise the power of eminent domain, a condemning authority must demonstrate that it is within the limitations on the power that are embodied in the Constitution, that the power has been delegated to it from the sovereign state, and that the power is exercised in accord with that delegation of authority. See generally, *In Re Powers Appeal*, 29 Mich 504, 506 (1874); *The Detroit Sharpshooters' Ass'n v The Highway Commissioners of Hamtramck*, 34 Mich 36 (1876). McQuillin's treatise points out that "[g]enerally, the purposes specified constitute the measure of the power; others cannot be substituted by the municipal condemnor." Eugene McQuillin, 11

The Law of Municipal Corporations § 32.20, p 339 (2000). The power "cannot be exercised without a legislative declaration of its objects and purposes, and of the methods and agencies by or through which it shall operate." *Id.* at § 32.11, p 313. Nowhere in either its Charter or in the Charter Counties Act is there a provision that Wayne County may use eminent domain to develop a massive mixed-use business development to be transferred to private entrepreneurship for private profit. Thus, the County is not authorized to take the property at issue here.

ARGUMENT II

EVEN UNDER *POLETOWN*, THE COUNTY HAS NOT SUSTAINED ITS BURDEN OF PROVING THAT THE TRANSFER OF CONDEMNED PROPERTY TO PRIVATE INTERESTS PRIMARILY ADVANCES PUBLIC RATHER THAN PRIVATE INTERESTS AND THUS MEETS THE *POLETOWN* "PUBLIC PURPOSE" TEST.

A. Standard Of Review.

The question of whether the County sustained its burden of proving that the transfer of condemned property to private interests primarily advances public rather than private purposes is a constitutional question subject to de novo appellate review. *Oakland County v Michigan*, 456 Mich 144, 149; 566 NW2d 616 (1997). The application of law to fact, or the finding of facts which is informed by legal standards, presents mixed issues of law and fact that are also reviewed de novo. *Johnson v Harnischfeger Corp*, 414 Mich 102, 121; 323 NW2d 912 (1982); *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

B. The Standard For Review Under *Poletown*.

When the condemnation power is used to take property to transfer for use by private entities, the state and federal constitutions require that the public interest be the predominant interest being advanced. Courts subject such takings to "heightened scrutiny." *Poletown Neighborhood Council v Detroit, supra*, 410 Mich at 634-635:

> The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.[7]

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[7]The Supreme Court invoked *Poletown's* "heightened scrutiny" standard most recently in *Tolksdorf v Griffith*, 464 Mich 1, 9; 626 NW2d 163 (2001), in which the Court struck down an
(Continued on next page)

The public benefit must not only be the primary benefit conferred by the condemnation, but must also be "clear and significant" rather than "speculative or marginal." *Poletown, supra*, 410 Mich at 634-635. Thus, in *Lansing v Edward Rose Realty*, 442 Mich 626, 634-635, 638-639; 502 NW2d 638 (1993), this Court rejected the City's attempt to obtain easements to enable a private company to run cable television lines to individual apartments in an apartment complex, the Court reasoning that the interests being advanced by such a project were predominately private rather than public.

In *Poletown*, the circumstances presented were extraordinary-the area where the General Motors manufacturing facility was to be built had high unemployment and was suffering fiscal distress, 410 Mich at 632; nothing of the kind exists here (but in any event Wayne County would have to proceed under the EDCA or some similar statute, such as the Blighted Area Rehabilitation Act, to invoke the same authority if the facts existed to support such action). Condemning land for the purpose of transferring it to private entities for the operation of private businesses is not a "public purpose," and does not "benefit" the "public" within the ordinary meaning of those words (in MCL 213.23). *Poletown, supra*, 410 Mich at 634-635; see also *Herald Co v Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000) (courts "must give the words of a statute their plain and ordinary meaning"). This case does not involve elimination of a blighted area, where it might be maintained that the public purpose is achieved merely by razing existing deleterious structures or conditions, with subsequent resale to new private ownership being secondary. *In re Slum Clearance*, 331 Mich 714, 720-722; 50 NW2d 340 (1951).

In *Tolksdorf v Griffith*, 464 Mich 1, 9; 626 NW2d 163 (2001), this Court concluded that the exercise of the power of eminent domain "to convey an interest in land from one private

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act which authorized the condemnation of land for the purpose of transferring a right of way from one landowner to another.

person to another" serves primarily private rather than public interests, and is therefore unconstitutional. The *Tolksdorf* Court concluded that the private roads act gave a right of permanent physical occupation to private individuals in order to allow them to pass over another private individual's property. 464 Mich at 11. The Court then framed the constitutional issue as "whether the public interest advanced here, access to landlocked property, is the predominant interest advanced." 464 Mich at 9. This Court was unconvinced that the act was primarily concerned with the public interest because it did "not impose a limitation on land use that benefits the community as a whole." 464 Mich at 10. Instead, it gave "one party an interest in land the party could not otherwise obtain." *Id.* This Court determined that the "taking authorized by the act appears merely to be an attempt by a private entity to use the state's powers 'to acquire what it could not get through arm's length negotiations with defendants.'" *Id.* quoting *Edward Rose Realty*, 192 Mich App 551, 558; 481 NW2d 795 (1992) aff'd 442 Mich 626; 502 NW2d 638 (1993). This Court therefore found that the private roads act was unconstitutional because it authorized a taking of private property for a predominantly private purpose." See also *In re Brewster Street Housing Site in City of Detroit*, 291 Mich 313, 334; 289 NW2d 493 (1939) ("the State has no power and authority under the power of eminent domain, or otherwise, to take the property of one man and give it to another"); *City of Center Line v Chmelko*, 164 Mich App 251, 254; 416 NW2d 401 (1987) (concluding that the taking primarily served private purposes, and that any public benefits were incidental). *Tolksdorf's* view of what constitutes a "private" and "public" purpose in the eminent domain context applies with equal force here.

The *Poletown* test for a public purpose is not satisfied here. In *Poletown*, the Court upheld the proposed condemnation based on the following key factual determinations, made after a ten day trial (410 Mich at 628):

> In the court below, the plaintiffs-appellants challenged the necessity for the taking of the land for the proposed project. In this regard, the city presented substantial evidence of the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate available sites to implement the project. [410 Mich at 633.]

It was those crucial factual underpinnings that caused the plaintiffs-appellants in *Poletown* not to challenge "the declaration of the Legislature that programs to alleviate and prevent conditions of unemployment and to preserve and develop industry and commerce are essential public purposes." 410 Mich at 631. Moreover, the Legislature's declaration of public purpose and necessity was found in the Economic Development Corporation Act under which the City of Detroit duly proceeded, 410 Mich at 633, ns 4-6; here, Wayne County has expressly disavowed any reliance on the EDCA, and has not attempted to follow the EDCA's exacting procedural requirements.

But because the legislative declaration regarding unemployment and industrial development required by the EDCA is inextricably intertwined with the procedures therein required, Wayne County cannot rely on the one without fulfilling the other:

> In *Arnett v Kennedy, supra*, 416 US pp 153-154; 94 S Ct p 1644,[8] the plurality opinion declared "that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."

Dow v State, 396 Mich 192, 207; 240 NW2d 450 (1976); accord *Marks v Battle Creek*, 358 Mich 114, 121; 99 NW2d 587 (1959) ("If municipal corporations choose to enter into competition with private persons and corporations in the rugged world of business, we think they should also be prepared to take the bitter with the sweet.").

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[8] *Arnett v Kennedy*, 416 US 134, 153-154; 94 S Ct 1633, 1644; 40 L Ed 2d 15 (1974).

Because the county, by disavowing the EDCA, adopted its resolution of necessity without an express delegation of statutory authority supporting its goals, the county's asserted public purpose is judicially reviewable. The "judicial deference granted state legislative determinations of public use is not accorded determinations of public purpose made by a municipality pursuant," at most, "to broad, general enabling statutes."[9] *Lansing v Edward Rose Realty, supra*, 442 Mich at 637 (1993).

Here, in contrast to *Poletown*, the circuit court found only that the county had not "abused its discretion" in deciding to condemn the defendants-appellants' properties. (Circuit Court Opinion, p 16). The circuit court derived this standard of review from *City of Troy v Barnard, supra*, 183 Mich App at 569, which in turn cites *Nelson Drainage District v Filippis*, 174 Mich App 400, 404; 436 NW2d 682 (1989) and MCL 213.56(2). However, the *Nelson Drainage District* case involved an agency, as did all the cases cited therein; judicial review of administrative agency determinations is guaranteed by Const 1963, art 6, § 28.

Condemnation is permissible only as allowed by Const 1963, art 10, § 2 and US Const, Am XIV, both of which require that a taking be for "public use." A legislative body cannot redefine for itself the meaning of such limiting constitutional phraseology; the judiciary is the final arbiter of the meaning of the constitution. *Durant v State Bd of Education*, 424 Mich 364, 392; 381 NW2d 662 (1985). Thus, a legislative determination of public use must be judicially vetted as reasonable, *General Development Corp v Detroit*, 322 Mich 495, 498; 33 NW2d 919 (1948); *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 39-40; 64 NW2d 903 (1954); *Bd of Health of Portage Twp v Van Hoesen*, 87 Mich 533, 539; 49 NW 894 (1891), and the public interest to be advanced must be real and must predominate over any private interest to be benefited.

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[9]Appellants continue to maintain that MCL 213.23 does not confer requisite authority on the county other than for public improvements and incorporation (Issue I); however, even if the Court disagrees, at most MCL 213.23 confers only "broad, general authority."

Lansing v Edward Rose Realty, supra, 442 Mich at 634-635. There must be "substantial evidence" that the public benefit is "clear and significant." *Poletown, supra*, 410 Mich at 434-435.

This case is dissimilar to *Poletown*, because it does not involve "substantial evidence of the severe economic conditions facing the residents of the [county] and state." When this condemnation action began, Michigan's economy was among the most robust in the nation, with lower than average unemployment. Unlike *Poletown*, this case does not involve the threatened loss of 6000 manufacturing jobs from the closing of existing outmoded plants of a major employer, or even the assurance that 6000 new manufacturing jobs will be created by that same employer, but rather an attempt to create a development that may or may not attract a speculative 3000 jobs of varying description, many at the lower end of the wage scale (hotel and recreational aspects of the development being notorious for low wage positions).

Wayne County has tried to avoid meeting the stringent *Poletown* requirements, as elucidated in *Edward Rose Realty*, by arguing that its proposed development will benefit non-specific, currently unidentifiable private interests. Wayne County's project is the worse, not the better, for this lack of specificity. *Poletown* teaches that the constitutional test is satisfied only when the public benefit is sufficiently predominant over a "specific, identifiable private interest."

The Court of Appeals focused in its per curiam opinion on the county's stated intentions. While it cannot be gainsaid that the county has lofty goals, what is sorely lacking is substantial evidence of a clear and significant public benefit. *Poletown, supra*, 410 Mich at 634-635. The public benefit cannot be "speculative or marginal." *Edward Rose Realty, supra*, 442 Mich at 638 quoting *Poletown* at 635. And, at best, that is how it must be characterized here.

In contrast to *Poletown*, where the public benefit was arguably well-documented and immediate, in this case Wayne County has no committed future tenants or purchasers. Because

GM sought the property to build an assembly plant, the number of persons to be employed, their wages, and the taxes to be generated from the project was known with some certainty. Here, Wayne County has no real idea how many persons may be employed, what their wages are likely to be, and what kind of taxes may be generated from the project. *Poletown* involved dire economic straits and a crisis of unemployment; nothing of the kind exists here or was in prospect when these condemnation actions were commenced.

Moreover, and in stark contrast to *Poletown*, for whatever period of time the county owns the aeropark land and any facilities it may construct thereon, the tax base will not rise, although public revenues will necessarily be committed to maintaining the infrastructure the county proposes to create in its aeropark. It will be many years, if ever, before the county recoups its initial outlay to acquire the land, let alone realizes higher net revenues from a merely potentially larger tax base (which carries with it greater obligations for police and fire protection, sewage treatment, air pollution, etc., all of which will increase county expenditures concomitantly). Merely opening land to development is not of itself a sufficient public purpose to sustain the invocation of eminent domain. *Tolksdorf v Griffith, supra*, 464 Mich at 10 ("'[A]ny benefit to the public at large is purely incidental and far too attenuated to support a constitutional taking of private property.'").

Unlike *Poletown*, here, as in *Edward Rose Realty*, the County's claimed public benefit must be deemed far too attenuated to support a constitutional taking of a private property because the County has no definite plan that can be examined by a court. Unlike *Poletown*, there is no high level of unemployment in the immediate area, nor is there a financial crisis; the Airport and its immediate environs are already a thriving or at least viable commercial area, with numerous businesses serving airport customers, such as hotels, motels, park and ride operations, and other commercial, agricultural, and residential usages. On this record, with no concrete plan

in place for use of any part of the property the County seeks to condemn, the County has not met the requirements of the test.

To uphold the taking in this case is to say that government may take private land for the purpose of turning it over to development that may someday expand the tax base. Yet the whole concept of private property is that the owner, subject to existing limitations (zoning, environmental protection, nuisance, and similar laws),[10] can develop his or her own land, or not, as the owner chooses. It would be a highly pernicious doctrine, destructive of private property rights, if the government, dissatisfied with an owner's existing level of development even though consistent with existing zoning and other laws, could begin reviewing development and dispossessing those owners who, in the government's view, are not sufficiently contributing to the economic life of the community and the property tax base.

This state of affairs, wherein government conceives of itself as society's principal entrepreneur, with a right to dispossess those lacking its vision, is simply unrecognizable to the system of property and individual rights familiar to the citizens of the United States, who ordained their present government to "secure undiminished to ourselves and our posterity" the "blessings of freedom," Const 1963, Preamble;[11] state government was not conceived for the purpose of destroying or defeating those rights. In our system of law, if government wants to encourage property owners to undertake certain kinds of developments, it offers incentives-tax credits, tax deductions, tax abatements, outright subsidies that conform to constitutional requirements; government does not simply take the property, develop the property as it thinks an

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[10]The types of laws that impose "a limitation on land use that benefits the community as a whole," as they are described in *Tolksdorf*.

[11]Identical to the Preamble of the 1908 Constitution.

enlightened entrepreneur would do, and then attempt to dispose of the property back into private hands.

The use of eminent domain in this case is unsanctioned by statutory authority, legislative findings, or cold, hard facts, and is illegal and unconstitutional per *Poletown* and its progeny.

ARGUMENT III

IN THE ALTERNATIVE, *POLETOWN* SHOULD BE OVERRULED BECAUSE THE "PUBLIC PURPOSE" TEST SET FORTH IN IT IS INCONSISTENT WITH CONST 1963, ART 10, § 2.

A. Standard Of Review.

Constitutional questions are reviewed de novo on appeal. *Oakland County v Michigan*, *supra*, 456 Mich at 149. A primary rule in construing provisions of the constitution is the rule of common understanding. *Federated Publications, Inc v Michigan State University Bd of Trustees*, 460 Mich 75, 84; 594 NW2d 491 (1999). This Court has embraced Justice Cooley's explanation of this principle:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it. [*Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) citing Cooley, Constitutional Limitations (6th ed), p 81.]

This Court has also taught that it is appropriate to consider "the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish. *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). If the text includes a technical, legal term then the court is to rely on the understanding of the term by those sophisticated in the law understood at the time of the constitutional drafting and ratification. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003). See also *Michigan Coalition of State Employee Unions v Civil Service Comm'n*, 465 Mich 212, 222; 634 NW2d 692 (2001).

The Court of Appeals' majority, in concurring opinions, reasoned that *Poletown* was wrongly decided, but recognized that the Court of Appeals is not the proper forum to debate that issue. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 504 NW2d 544 (1993). Regardless of

whether the County is authorized to take the property under MCL 213.23 or otherwise, it is barred from doing so on the basis of the Michigan Constitution.

B. A Textualist Approach To Interpreting The Michigan Constitutional Provision That Authorizes The Taking Of Private Property Compels A Reversal Of *Poletown*'s Public Purpose Test Because the Common Understanding of Article 10 § 2 Was That It Limited Use of Eminent Domain To The Taking of Property for Private Use After Just Compensation Was Paid.

The Michigan Constitution provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

Const 1963, art 10, § 2.[12] Close textual analysis of the provision suggests that it does not allow private property to be taken for private use.

Article 10, § 2 of the Michigan Constitution recognizes the power of eminent domain, a power that has ancient origins. The term "eminent domain" itself was apparently coined by sixteenth century author Hugo Grotius who discussed in his 1625 book. Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW U L R 569, 571 (2003) quoting Hugo Grotius, The Law of War and Peace, Vol 2, Ch XIV, (L Loomis, trans, Walter J Black 1949). From those early times to the present, scholars and jurists discussing it have emphasized that the power of eminent domain must be exercised only in limited circumstances. See generally Timothy Sandefur, *A Natural Rights Perspective On Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW U L R 569 (2003).

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[12]The United States Constitution likewise has a takings clause, which provides: Nor shall private property be taken for public use, without just compensation. US Const, art V.

During the Revolutionary War era, the concerns of property owners were heightened when state governments took a series of steps making property rights less secure. Matthew P Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L J 1245, 1252 (2002). James Madison cautioned about the need for protection of property rights from invasion by the legislature:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments, the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is a mere instrument of a major number of the constituents. The Federalist No. 48 (James Madison) as quoted in Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L J 1245, 1292, n 191 (2002).

Madison recognized that the greatest threat to the republic would come from the legislature. He feared that "the rights of property and the public liberty will not be secure in their hands; or which is more probable, they will become the tools of opulence and ambition, in which case there will be equal danger on another side." Max Ferrand, 2 The Records of the Federal Convention of 1787, 204 (1966). '

Today's longstanding protections for individual property rights can be traced back to these Lockean notions about government's role as a protector of property rights. See generally, Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L R 285 (2000). The philosopher John Locke argued that the "great and chief end, therefore, of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property." John Locke, Second Treatise of Government 66 (C.B. Macpherson ed, Hacket Pub Co, 1980) (1690). In line with Locke, Madison warned "that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, *Property, National Gazette* (Mar. 27, 1792) quoted in Donald J. Kochan, "Public Use" and the Independent

Judiciary: Condemnation in an Interest Group Perspective, 3 Tex R & Pol 49 (1998). Another founding era leader, Gouveneur Morris, also cautioned that the stability of the American system of government would be jeopardized by property rights violations. Gouveneur Morris, *Address to the Pennsylvania Assembly* (1785), reprinted in Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 73 (1990) as cited in Harrington, at 1279, n 126.

As the Constitution was being written in Philadelphia during the summer of 1787, Congress was acting to limit the power of eminent domain by territorial legislatures. A just compensation provision was included to prevent territorial legislature from acting to rescind land grants. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L J 694, 707 n 73 (1985). This provision did not grant the power to take private property, a power that was thought to inhere in the sovereign to begin with; it protected the rights of property owners by limiting the exercise of that power. Northwest Ordinance, art 2, cl 5 cited in Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal L R 267, 276 (1988).

Today's constitutional just compensation provision can be traced back to the Northwest Ordinance of 1787. The text relating to depriving a person of property provided in pertinent part:

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.

Northwest Ordinance of 1787, art 2. The Michigan Constitution has retained a just compensation provision since then. The 1835 Constitution, art 1, § 19, provided:

> The property of no person shall be taken for public use, without just compensation.

In 1850, the eminent domain provision was expanded in article 18, § 2, which provided:

> When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefore, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: Provided, The foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners.

In 1908, the constitution further detailed and circumscribed the power of eminent domain. Article 13 dealt with the taking of property, in five separate provisions. Article 13, § 1, the section dealing with public use and just compensation, provided:

> Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefore being first determined and just compensation therefore first being made or secured in such manner as shall be prescribed by law.

The 1963 Constitution placed the basic eminent domain provision in article 10, the article that dealt with property. Article 10, § 2 provides:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

The Convention Comment to this provision reads as follows:

> This is a revision of Sec. 1, Article XIII, of the present [1908] constitution which, in the judgment of the convention, is a sufficient safeguard against taking of private property for public use. Further provisions relative to eminent domain and procedures appearing in Sections 2, 3, 4 and 5, Article XIII, of the present constitution have been eliminated.
>
> This section clearly indicates that proper procedures for the acquisition of private property for public use are to be determined by the legislature and that compensation for such property must be determined in proceedings in a court of record. Const 1963, art 10, § 2, Convention Comment.

Nothing in this history reflects language empowering the condemning authority to take property for private use, if it could point to some public benefit or purpose. Instead, both directly and by

negative implication, the drafters limited the state's exercise of eminent domain to circumstances where the condemning authority takes property "for public use" and nothing more. This understanding of the provision as a limitation on the sovereign's power is reflected in both its text, the history, and early interpretation.

The text of the taking clause speaks of "public use." Const 1963, art 10, § 2. The common understanding of this term confirms that it is not synonymous with the phrase "public purpose." As early as 1871, Justice Cooley observed that a "public use" only existed "where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare." Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 533 (2d ed 1871). In other words, Cooley identified a "public use" as one in which the government takes property to supply "its own needs" or one in which the government takes property to furnish "facilities for its citizens." This common understanding coincides with the traditional use of eminent domain for government office buildings or for public facilities for its citizens, such as schools or parks. It does not coincide with a use by private entities that is neither to be open to the public nor owned by it.

This view of "public use" as encompassing a limitation on the power to take private property is strengthened by analysis of the dictionary definitions of the words as understood and used at the time. Eighteenth century dictionaries defined public and private as opposites. See Kochan, at 61-62. Public meant that which "belonging to a state or nation is not private ... general ... regarding not private interest but the good of the community." Johnson, *A Dictionary of the English Language* (1755) as quoted in Kochan at 61.

The word "use" also incorporated limits because it implied that the property must be used by the public. In other words, the "public use requirement traditionally meant that the property

had actually to be used by the public." Cass R. Sunstein, *Lochner's Legacy*, 87 Colum L R 873, 891 (1987). See also Richard Epstein, Takings: Private Property and the Power of Eminent Domain 29, 162-181 (1985). See generally, James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (1998). Thus, Justice Cooley, in discussing the scope of eminent domain power emphasized that taking property to convey it to private parties would be unlawful:

> If taken for a purely private purpose, it would be unlawful. Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.

Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative power of the States of the American Union, 585-586 (2d ed, 1871). Cooley argued that property could be transferred to private entities only in recognized areas of eminent domain such as the construction of public ways, a common carrier, or public goods. *Id.*

Michigan courts traditionally interpreted "public use" to have a narrower meaning than "public purpose." See e.g. *Swan v Williams*, 2 Mich 427 (1852); *Board of Health of the Twp of Portage v Van Hoesen*, 87 Mich 533; 49 NW 894 (1891); *Lakehead Pipe Line Co, Inc v Dehn*, 340 Mich 25; 64 NW2d 903 (1954); *Shizaz v Detroit*, 333 Mich 44, 50; 52 NW2d 589 (1952). This Court's analysis in *Van Hoesen* illustrates the traditional understanding of the text. There, this Court long ago held that a "use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded, is in no sense a public use." 87 Mich at 538. This Court elaborated on the limitations inherent in the "public use" requirement:

> Land cannot be condemned for the purpose of enabling those instigating the proceedings to parcel it out to private individuals. Nor is a use which is not common to the public, and over which the state has surrendered that control and regulation necessary to secure such common use, a public use. *Id.*

This Court explained that it would "not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use." 87 Mich at 539. See also *Ryerson v Brown*, 35 Mich 333, 338-339 (1877). In other words, the constitutional limiting phrase "public use" has consistently been read as embodying a requirement that private property be taken only for a "public use," that is, a "use" from which the general public cannot be excluded.

Michigan courts have traditionally refused to permit the power of eminent domain to be used where the intention to confer a private use or benefit forms the purpose, or part of the purpose of the proceeding or taking. *Berrien Springs Water Power Co v Berrien Circuit Judge*, 133 Mich 48, 51-52, 94 NW 379 (1903). See also *Shizaz v* Detroit, 333 Mich 44, 54; 52 NW2d 589 (1952). In these and other early decisions, courts did not simply ask whether the public would benefit from the taking; they sought to determine whether the public would "use" the property after it was taken. Even where the line to distinguish between a public and private use was extended to permit taking property for railroads or common carriers or utilities, it was done with stringent requirements that the public be entitled to use the railroad, highway, or utility. See generally, James W. Ely, Jr., Railroads & American Law, 35-39 (2001) ("[the land] is taken to be immediately and directly applied to an established public use, under the control and direction of the public authorities, with only such incidental private interests, as the legislature has thought proper to admit, as the means of effecting the work and insuring a long preservation of it for the public use." *Raleigh & Gaston RR Co v Davis*, 19 NC 451, 469-470 (1837) quoted at 36 of Ely, Railroads & American Law. Only on this reasoning, and with these stringent requirements not

satisfied here, could the "use" be said to be "public." See Justice Ryan's discussion in *Poletown*, 410 Mich at 674-680.

The proper definition of "public use" has been subject to debate, both nationally and in Michigan. See generally, 2A Nichols On Eminent Domain § 7.02[2] (3d Ed 2002). One school of thought—the only one consistent with the "original intent" of the people who adopted the Michigan Constitutions of 1963, 1908, 1850 and 1835—defines "public use" as use by the public. In other words, the property must actually be used by the public or the public must have the opportunity to use it. Nichols, citing cases including *Board of Health v Van Hoesen*, 87 Mich 533; 49 NW 894 (1891).

The other school of thought —whom we might call the non-textualist revisionists, into whose deviation the *Poletown* majority fell—argues that "public use" should be given an expansive meaning so as to extend to mere "public advantage" or "public benefit." *Id.* at § 7.02[3]. Under this approach, the "'public use' limitation on eminent domain ... is no longer a serious limit on eminent domain because of its broad construction." *Id.* This second approach can be traced to decisions reflecting a gradual departure from the traditional understanding of eminent domain. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 Minn L R 1277, 1280-1284 (1985). In essence it amounts to a transfer of the judicial power to interpret the constitution to the legislature. *Id.* But it finds no support in the text of Michigan's constitution; and it is contrary to the historical use and understanding of eminent domain.

After a long and unbroken line of decisions enforcing the constitutional limitations inherent in the term "public use," this Court deviated from its prior consistent holdings in *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981). In *Poletown*, this Court concluded that eminent domain was permissible if the judicially engrafted "public

purpose" gloss on the constitutional text was satisfied, even when the taking was intended to transfer property from one private owner to another without direct governmental use of the land or assurances that the private recipient would use it to serve the public. Justices Fitzgerald and Ryan both dissented from this decision, which took Michigan "into a new realm of takings of private property." 410 Mich at 462. (Fitzgerald, J, dissenting).

Justice Ryan warned that *Poletown* amounted to "judicial approval of municipal condemnation of private property for private use." 410 Mich at 646. According to Justice Ryan, the "real controversy which underlies this litigation concerns the propriety of condemning private property for conveyance to another private party because the use of it by the new owner promises greater public 'benefit' than the old use." 410 Mich at 467. Justice Ryan distinguished public use and public purpose, explaining that each concept could be traced to the separate jurisprudences of the taking and the taxing clauses. 410 Mich at 662-665. Reviewing the history of Michigan law in these areas, Justice Ryan pointed out that under the majority's "unsound and improvident decision, the separate jurisprudences of two constitutional provisions have merged into one as though it was always so." 410 Mich at 659. Justice Ryan criticized the majority for abrogating the longstanding general rule that "[l]and cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it." 410 Mich at 476 quoting *Berrien Springs Water-Power Co v Berrien Circuit Judge*, 133 Mich 48, 53; 94 NW 379 (1903).

Justice Ryan insisted that the *Poletown* court had subordinated the property owners' constitutional interests to those of private corporate interests. He explained that the only way to accomplish a transfer of private property to a private owner for private use would be through a constitutional amendment:

> The sudden and fundamental change in established law affected by the Court in this case, entailing such a significant diminution of constitutional rights, cannot be justified as a function of judicial construction; the only proper vehicle for change of this dimension is a constitutional amendment.

410 Mich at 683. Despite these words, the *Poletown* majority upset decades of Michigan jurisprudence, ignored the historically consistent and textually faithful "public use" test of article 10, § 2, and adopted a rule that allows a condemning authority to take one person's private property and transfer it to another whenever the condemning authority declares this to result in a benefit to the public. *Poletown* has not, as Justice Ryan hoped, lost its "precedential value" in "the accumulating rubble." 410 Mich at 684. Instead, it has led to an increasingly bold use of the power of eminent domain to help private interests of all kinds, just as James Madison predicted.

The conclusion that article 10, § 2 limits the taking of private property to circumstances in which the property will have a "public use" stems from both the text, the common understanding, and the history of this clause. The *Poletown* majority approved a gloss to the words "for public use.". Unmoored from the text, the constitutional limitations on the taking of property to private use disappeared.

In place of the constitutional phrase "public use," the *Poletown* court substituted the public purpose text used to justify taxes. Const 1963, art 7, § 21.[13] This textual distinction between the eminent domain provision and the tax provision was no accident. These words were specifically embodied in the text of the Michigan Constitution and employed when deciding tax and eminent domain cases for over a century in Michigan. See e.g., *Ryerson v Brown*, 35 Mich 333 (1877). But this Court read these different words as though they were the same, equating

[13]Each city and village is granted the power to levy ... taxes for public purposes. Const 1963, art 7, § 21.

"public use" with "public purpose." Nothing in the text or history of the provision supports such a reading.

The *Poletown* majority's decision is inconsistent with the constitutional text, with the historical and common understanding of the language used, and with its traditional application in Michigan law. Accordingly, *Poletown* should be reversed and this Court should adopt a reading of article 10, § 2 that limits the use of eminent domain to the taking of private property that is for public use. Under such a reading, a reversal is required.

ARGUMENT IV

IF *POLETOWN* IS OVERRULED, THE NEW RULE SHOULD BE GIVEN RETROACTIVE EFFECT; IN ALL EVENTS, THE NEW RULE SHOULD APPLY TO THIS SPECIFIC CASE.

The order granting leave directs the parties to "the reasoning in *Pohutski v City of Allen Park*, 465 Mich 675 [641 NW2d 219] (2002)." There, the Court reasoned, 465 Mich at 696-696:

> Although the general rule is that judicial decisions are given full retroactive effect, *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240, 393 NW2d 847 (1986), a more flexible approach is warranted where injustice might result from full retroactivity. *Lindsey v Harper Hosp*, 455 Mich 56, 68, 564 NW2d 861 (1997). For example, a holding that overrules settled precedent may properly be limited to prospective application. *Id.* Moreover, the federal constitution does not preclude state courts from determining whether their own law-changing decisions are applied prospectively or retroactively. *Great Northern R Co v Sunburst Oil & Refining Co*, 287 US 358, 364-365, 53 S Ct 145, 77 L Ed 360 (1932).
>
> This Court adopted from *Linkletter v Walker*, 381 US 618, 85 S Ct 1731, 14 L Ed 2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v Hampton*, 384 Mich 669, 674, 187 NW2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 US 97, 106-107, 92 S Ct 349, 30 L Ed 2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988) (Griffin, J.).

As a backdrop, it is important to be mindful that the presumption that all decisional rules apply retroactively finds its roots in Blackstone who explained that the duty of the court is not to "pronounce a new law, but to maintain and expound the old one." *Linkletter v Walker*, 381 US 618, 622-623; 85 S Ct 1731; 14 L Ed 2d 60 (1965) (quoting 1 W Blackstone, Commentaries * 69). The judge's function is not to legislate but to explain the meaning of legislation enacted by the legislative body. Even when overruling prior precedent, the new decision is "an application of what is, and therefore had been, the true law." *Linkletter*, 381 US at 623 (citing Shulman,

Retroactive Legislation, in 13 Encyclopedia of the Social Sciences 355, 356 [1934]). One state court justice explained the thinking behind the rule:

> I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the legal decision, and that the former decision was not, and never had been the law, and is overruled for that very reason. *Gelpcke v City of Dubuque*, 68 US (1 Wall) 175, 211 (1863) (Miller, J, dissenting).

Former Supreme Court Justice Harlan cautioned in one early decision that picking and choosing between similarly situated litigants those who alone will receive the benefit of a "new" rule of law offends against our basic judicial tradition. *Desist v United States*, 394 US 244, 256; 89 S Ct 1030; 22 L Ed 2d (1969) (Harlan, J, dissenting). In Harlan's view, matters of principle were at stake that required the retroactive application of precedent. He deplored the doctrinal confusion that he thought stemmed from creating exceptions to the retroactivity doctrine. 394 US at 258.

In more recent times, Justice Scalia and others have criticized the judiciary for usurping legislative powers by toying with retroactivity. Justice Scalia took the position that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be." *American Trucking Ass'ns v Smith*, 496 US 167, 200; 110 S Ct 2323; 110 L Ed 2d 148 (1990), (Scalia, J, concurring in the judgment). According to Scalia, applying decisions prospectively "is contrary to that understanding of 'the judicial power' which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, the very exercise of power asserted in [this case]." *Id.* at 201. See also Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv J of Law & Public Policy 811 (2003).

The selective application of such rules is also barred because it violates the principle of treating similarly situated persons the same. *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). In a concurring opinion, Justice Scalia cautioned against the idea that a court can tinker with retroactivity without violating significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent. 509 US at 105, 113 S Ct at 2522.

According to Justice Scalia, the "true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Id.* citing *James B Beam Distilling Co v Georgia*, 501 US 529, 534; 111 S Ct 2439, 2443; 115 L Ed 2d 481 (1991) and other cases.

Not surprisingly in light of this backdrop, Michigan courts have traditionally given litigants who successfully obtain a reversal of prior precedent, always after much risky investment of time, energy, and expense, the benefit of the new rule. *Placek v Sterling Heights*, 405 Mich 638, 690-691; 275 NW2d 511 (1979) (Coleman, C.J. dissenting because the majority "seemingly automatically" considered the benefits of the decision "to be due the parties in the instant case."). This traditional retroactive application of judicial decisions in all civil cases on direct review stems from a proper understanding of the court's function, which is to decide litigated issues brought before them. Shannon, at 838-839. According to commentators, "[p]rospective announcements of judge-made law raise both accuracy and legitimacy concerns." Shannon, at 849 quoting Michael C. Dorf, *Dicta and Article III*, 142 U Pa L R 1997, 2000 (1994). Prospective decision making is difficult to predict, potentially denies the litigants of the benefit of a decision in their favor, and often leads to ambiguous results in practice because the determination of whether events occurred before or after the date of a precedent-setting opinion

can be difficult to ascertain. And prospective decisionmaking tends to undermine public confidence in the judiciary because it injects uncertainty into the process, undermines the notion that courts say what the law is, and not what it should be, and allows for a highly subjective approach.

Each time the Court arrogates to itself the power to legislate, it harms the administration of justice. Each time the Court judicially decides whether to apply a principle (that must be seen as a correct statement of the law) to only some cases rather than to all like cases, it harms the administration of justice. If prospective application of the law might conceivably be justified when addressing a change in the common law (an area within the judiciary's unique purview) or when dealing with vested contract rights or when imposing a new duty or obligation, no such rationale applies here.

Despite the longstanding understanding of the judiciary's limited role, as noted above, Michigan courts (as well as other state courts) have created a limited exception, which may be used to restrict the effect of certain decisions that overrule past precedent in limited circumstances when the court overrules uncontradicted, settled precedent whose resolution was not clearly foreshadowed (assuming a weighing of the three factors outlined above also warrants deviating from the general rule of full retroactivity). See, e.g., *Tebo v Havlik*; 418 Mich App 350; 343 NW2d 181 (1984); *Sturak v Ozomaro*, 238 Mich App 549; 606 NW2d 411 (1999); *Lindsay v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997).

We turn first to the threshold question of whether overruling *Poletown*'s "public purpose" test and replacing it with the proper "public use" paradigm would constitute "clearly establishing a new rule of law." It must here be observed that *Poletown* itself represented a rejection of prior Michigan jurisprudence that was far less deferential to legislative or executive action with respect to whether an invocation of the power of eminent domain satisfies the "public use"

requirement. The Michigan Supreme Court itself had flatly asserted that "Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it." *Berrien Springs Water-Power Co v Berrien Circuit Judge*, 133 Mich 48, 53; 94 NW 379 (1903).

Moreover, the law has always been that municipal governments are creatures of statute and have only the powers conferred on them by the Legislature; no statute empowering Wayne County to embark upon entrepreneurial development, whether for its own profit or in aid of private enterprise, has or can be cited by Wayne County in this case, and thus, again, overruling *Poletown* restores the fabric of long-established jurisprudence in this respect, *Bird v Common Council of Detroit*, 148 Mich 71, 96-97; 111 NW 860 (1907) (Grant, J., concurring),[14] the warp and woof of which was torn asunder by *Poletown*.

This central factor controls all other aspects of the three-factor *Linkletter* test: (1) the purpose of the "new" rule is to conform Michigan jurisprudence to the mandates of the Michigan Constitution; (2) there can have been no proper or legitimate reliance on a rule of Michigan law adopted in contravention of the constitutional text; and (3) the effect of full retroactivity on the administration of justice will be to honor the commands and prohibitions of the Michigan Constitution. *Pohutski, supra*, albeit in the context of the prior misreading of a mere statute rather than of a constitutional command:

> In considering the reliance interest, we consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real- world dislocations." *Id.* at 466, 613 N.W.2d 307. Further, we must consider reliance in the context of erroneous statutory interpretation:

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[14]In this regard Justice Grant's opinion provided the necessary fourth vote for affirmance; the Occam's Razor principle means that Justice Grant's opinion, which proceeds on the narrowest grounds supporting the actual result, thus establishes the rule of the case. In any event, the plurality opinion of Justices Carpenter, McAlvay and Hooker was in this regard to like effect. See 148 Mich at 88-90.

> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory, ... that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [Id. at 467-468, 613 NW2d 307.]
>
> Thus, while too rapid a change in the law threatens judicial legitimacy, correcting past rulings that usurp legislative power restores legitimacy. *Id.* at 472-473 (CORRIGAN, J., concurring)
>
> Accordingly, we must shoulder our constitutional duty to act within our grant of authority and honor the intent of the Legislature as reflected in the plain and unambiguous language of the statute.

465 Mich at 694-694. That reasoning applies here when the prior misreading was of a clear constitutional provision, for it is surely to the words of the constitution that the citizen first looks both in voting to adopt that constitution and then in understanding and interpreting it. As the Court reasoned in *People v Nash*, 418 Mich 196, 209; 341 NW2d 439 (1983):

> The technical rules of statutory construction do not apply when construing a constitution. *Traverse City School Dist v Attorney General*, 384 Mich 390, 405, 185 NW2d 9 (1971). Instead, our task is to divine the "common understanding" of the provision, that meaning "which reasonable minds, the great mass of the people themselves, would give it." Cooley, *Const Limitations* (6th ed.), p 81. Words are to be given their ordinary meaning.

The legitimate expectation of the people of Michigan is that the *Poletown* decision overriding critical limitations on eminent domain should never have been issued, and that it be effaced as

completely as possible once the error, having been once perpetrated, is at last recognized and corrected.

Thus, the purpose of the "new" rule is to honor the actual intent of the people of Michigan who framed art 10, § 2 of the 1963 Constitution as an essential limitation on the power of state and local government, for their liberty and protection. The *Poletown* rule, by contrast, exalted government action in favor of one class of citizens over the rights of other citizens, in the name of the public good. *Poletown* thus distorted the essential nature of constitutional government as limiting the powers of government and confining government activity to defined spheres. Resurrecting the limitations of art 10, § 2 to fulfill the will of the people as expressed in their fundamental charter by full retroactivity thus honors our most basic and sacred democratic principles.

Second, there is no need to consider and balance any reliance interest here. Under MCL 213.57, if a property owner fails to challenge the necessity of the acquisition, then title to the property vests in the condemning authority. But if the property owners timely challenge the necessity, then "[t]itle to the property shall also vest in the agency, as provided in this act, if the motion to review necessity is denied after a hearing and after any further right to appeal has terminated, title to the property shall also vest in the agency as of the date on which the complaint was filed or such other date as the court may set upon the motion of the agency." MCL 213.57(1). In other words, title does not vest in the condemning authority until after the conclusion of any appeals have terminated where the property owners have timely challenged necessity and timely pursued their appeals, although it is deemed to have done so as of the date that the complaint was filed. As a result, Wayne County has not received title, did not, and could not reasonably have relied on getting title while this litigation has been and is pending. Not surprisingly in light of this law, there are literally no changes "on the ground" that might have to

be undone if the new rule were retroactively applied to his case; to the contrary, full retroactivity would simply result in the existing status quo continuing.

Nor, as a general proposition, could there ever have been significant reliance on *Poletown*; even under *Poletown*, where transfer to new private ownership was contemplated from the outset of a condemnation proceeding, "heightened scrutiny" comes into play to threaten an ultimate upset of the eminent domain applecart. Hence, any government entity that is proceeding in reliance on *Poletown* already has to be fully cognizant that its plans are imperiled. Especially is this so in light of the subsequent decision in *Tolksdorf v Griffith*, 464 Mich 1, 9; 626 NW2d 163 (2001), where the Court concluded that the exercise of the power of eminent domain "to convey an interest in land from one private person to another" serves primarily private rather than public interests, and is therefore unconstitutional.[15] See also *In re Brewster Street Housing Site in City of Detroit*, 291 Mich 313, 334; 289 NW2d 493 (1939) ("the State has no power and authority under the power of eminent domain, or otherwise, to take the property of one man and give it to another"). In *Lansing v Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993) the Supreme Court likewise found that use of eminent domain to benefit private enterprise, with at most secondary public benefits, was constitutionally inadequate to the task. The Court of Appeals' history of narrowly interpreting *Poletown*'s exception to the established rule, *City of Center Line v Chmelko, supra*; *City of Novi v Robert Adell Children's Trust, supra*, further demonstrates *Poletown*'s inherent circumscriptions. Thus, a claim of "reliance" on so slender a reed as *Poletown* cannot be maintained by Wayne County.

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[15]Indeed, *Tolksdorf* appears facially inconsistent with *Poletown* and thus presages *Poletown*'s demise, but only this Honorable Supreme Court can with authority sound the long overdue and well-deserved death knell of *Poletown*. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Further, because declarations of necessity must be promptly challenged, MCL 213.56(1), (4), (7), and appealed, if at all, on an interlocutory basis by leave, MCL 213.56(6), the number of pending cases which involve planned transfers of land from existing ownership to new private ownership that might be affected by the overruling of *Poletown* is surely *de minimis*. As a practical matter, few challenges to necessity are ever mounted; in even fewer cases are there interlocutory appeals-which must be still pending, in order for retroactivity to be relevant.[16] Therefore, there will be no major impact on the administration of justice, no serious "dislocation," if full retroactivity is accorded the decision to overrule *Poletown*.

[16]A Westlaw search produced only eighteen Michigan appellate cases involving necessity challenges since 1891, of which only the application for leave to appeal in *Novi v Robert Adell Children's Funded Trust*, 253 Mich App 330; 659 NW2d 615 (2002) remains pending as of this writing.

RELIEF

WHEREFORE, defendants-appellants respectfully request that this Court reverse the decisions of the Court of Appeals and the circuit court and remand this matter to the circuit court for the entry of judgment in favor of the defendant-appellants.

Respectfully submitted,

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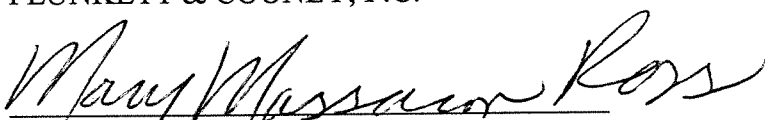

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DATED: January 9, 2004

STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

EDWARD HATHCOCK,

Defendant-Appellant,

/

Supreme Court No. 124070

Court of Appeals No. 239438

Wayne Circuit Court No. 01-113583-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

AARON T. SPECK & DONALD E. SPECK,

Defendants-Appellants,

/

Supreme Court No. 124071

Court of Appeals No. 239563

Wayne Circuit Court No. 01-114120-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

AUBINS SERVICE, INC, DAVID R. YORK, Trustee, David York Revocable Living Trust,

Defendants-Appellants,

/

Supreme Court No. 124072

Court of Appeals No. 240184

Wayne Circuit Court No. 01-113584-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

JEFFREY J. KOMISAR,

Defendant-Appellant,

/

Supreme Court No. 124073

Court of Appeals No. 240187

Wayne Circuit Court No. 01-113587-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

ROBERT & LELA WARD,

Defendants-Appellants,

-and-

HENRY Y. COOLEY,

Defendant,

/

Supreme Court No. 124074

Court of Appeals No. 240189

Wayne Circuit Court No. 01-114113-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

MRS. JAMES GRIZZLE &
MICHELLE A. BALDWIN,

Defendants-Appellants,

-and-

RAMI FAKHOURY,

Defendant,

_____/

Supreme Court No. 124075

Court of Appeals No. 240190

Wayne Circuit Court No. 01-114115-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

STEPHANIE A. KOMISAR,

Defendant-Appellant,

_____/

Supreme Court No. 124076

Court of Appeals No. 240193

Wayne Circuit Court No. 01-114122-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

THOMAS L. GOFF, NORMA GOFF, MARK,
A. BARKER & KATHLEEN A. BARKER,

Defendants-Appellants,

_____/

Supreme Court No. 124077

Court of Appeals No. 240194

Wayne Circuit Court No. 01-114123-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

VINCENT FINAZZO,

Defendant-Appellant,

-and-

AUBREY & DULCINA GREGORY,

Defendants,

_____/

Supreme Court No. 124078

Court of Appeals No. 240195

Wayne Circuit Court No. 01-114124-CC

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

CHRISTINE M. WARNEZ, being first duly sworn, deposes and says that on January 9, 2004, a copy of Defendants-Appellants' Brief on Appeal, was served on, MARK J. ZAUSMER,

Attorney for Plaintiff-Appellee, 31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374; ALAN T. ACKERMAN, Attorneys for Defendants-Appellants, 5700 Crooks Road, Suite 405, Troy, MI 48104; ALLAN S. FALK, Attorney for Defendants-Appellants, 2010 Cimarron Drive, Okemos, MI 48864; and MARTIN N. FEALK, Attorney for Defendants-Appellants Specks, 20619 Ecorse Road, Taylor, MI 48180-1963, by depositing same in the United States Mail with postage fully prepaid.

CHRISTINE M. WARNEZ

Subscribed and sworn to before me
January 9, 2004.

CHRISTINE BORGHI
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Sep 2, 2005

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